BOOK REVIEWS.

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COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES. By BURR W. JONES. Rewritten and enlarged by L. Horwitz. San Francisco: BANCROFT-WHITNEY Co. 1913. pp. Vol. I, xxxvi, 1031; Vol. II, x, 1071; Vol. III, x, 1036; Vol. IV, ix, 976; Vol. V, vi, 1157.

This work, by Prof. Burr W. Jones of the University of Wisconsin, is an enlargement of Jones on Evidence, a book which had previously been through three editions. The present edition takes a place as one of the long works on the law of evidence.

The purpose of the reviser is thus stated in his preface: "Herein will be found no extravagant titles—no flights of forensic diction—no newly-raised hair-splitting contests, but an honest effort to set out the law of to-day, so that the intelligent reader may understand it, and verify each proposition by its accompanying citation."

In so far as the author has attempted to state the law of evidence simply and without any fire-new terminology, his efforts is to be commended, and it must be admitted that in general the language of the text is simple and the terms used are those to which the profession is accustomed. He has not endeavored to be original merely through being different from others—an error from which recent authors of note on the law of evidence have not been altogether free.

In the endeavor to set out the law "so that the intelligent reader may understand it," the book is not always all that might be desired. The work gives evidence of great industry in collecting material, but the material is sometimes not well selected, correlated, or criticised. For instance, (Vol. II, p. 3) there is a long extract from the case of *Gunn* v. *Dolan* which the author calls an "interesting description of the burden of proof," which seems on the contrary neither interesting nor valuable. Again, (Vol. II, p. 4) where Stephen's definition of the burden of proof is quoted: "The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given, if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceedings go on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor." Concerning this definition the author merely says: "This rule has been generally approved in this country." Here no comment is made on the failure of Stephen to distinguish clearly between the burden of establishing a proposition and the burden of going forward with evidence—a radical defect in this definition; and this, too, though the fact that there is a confusion in legal usage between these two meanings of the term burden of proof is recognized by the author on the very next page of the book. (Vol. II, p. 5.) Still later, (Vol. II, p. 6) a well known extract is given from the opinion of Lord Justice Bowen in the case of *Abrath* v. *The Northeastern Ry.* (1883) L. R. 11 Q. B. D. 440, (the quotation marks being unfortunately omitted, though the citation of the case is referred to in the foot-note). In this passage, Lord Bowen uses the term burden of proof in the sense of burden of going forward with evidence, but this fact is not clearly pointed out by the author who

merely adds these words to Lord Bowen's statement: "That being so, the question as to the onus of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win." This is true, but only in one of the meanings of the term burden of proof, and this fact should have been more clearly indicated at this point, and not left merely to inference from what the author has stated before.

In treating the best evidence rule, the author (Vol. II, p. 167) quotes with seeming approval the language of Prof. Thayer, that the term best evidence "would probably have dropped naturally out of use long ago, if it had not come to be a convenient short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble is that it is not true to the facts, and does not hold out in its application." Yet, a few lines further on (Vol. II, p. 168) the author says: "The rule is elementary which requires the production of the best evidence of which the case, in its nature, is susceptible. The rule does not demand the greatest amount of evidence which can be given on the litigated fact, but its design is to prevent the introduction of any, where from the nature of the case, the law presumes, or the proof shows that better evidence is in the possession or under the control of the party." This is certainly too broad a statement of the rule as enforced to-day, and yet the author makes it in the face of the very accurate statement of Prof. Thayer which the author himself has just quoted without dissent.

Concerning the pedigree exception to the hearsay rule (Vol. II, p. 709) we find the following: "The declarations of the deceased parents as to the legitimacy or illegitimacy of their own children are admissible." This view is set forth more fully in the foot-note on the same page. The author here fails to see the difference between using these hearsay statements to prove illegitimacy *per se* (as in the case of *Crispin* v. *Doglioni* (1863) 3 Swab. & T. 44) and using them to negative a claim of legitimacy. He does not seem fully to have grasped the principle that there is no question of pedigree except in cases where there is a claim of legitimate relationship.

The treatment of the admissibility of hearsay declarations as part of the *res gestae* leaves much to be desired. Thus (Vol. II, p. 809) it is said concerning the things admissible as part of the *res gestae*: "Their sole distinguishing feature is that they should be the necessary incidents of the litigated act * * *. In other words, they must stand in immediate causal relation to the act." Now in reality in case of declarations admitted as part of the *res gesta,* it is the act which the declaration accompanies which stands in the causal relation to the declaration, not the declaration which stands in causal relation to the act. The act is the *res gesta,* and the declaration goes in because it is brought forth by and spontaneously accompanies the *res gesta.* The author also quotes with apparent approval one of the most confusing and erroneous statements of the doctrine of the *res gesta* in our law—that made by Mr. Justice Swayne in Travelers' Insurance Co. *v.* Mosely (1869) 8 Wall. 397, which lays it down that the declarations accompanying the principal fact are the *res gestae,* thus reversing the sound conception of the whole doctrine of the *res gesta* exception to the hearsay rule, which is that of some hearsay statement which is admitted in evidence because it accompanies and qualifies or explains some other fact (*res gesta*) which is of itself admissible in the case.

There is no branch of the law of evidence where mere uncritical quotation is more dangerous than in the subject of the *res gesta,* and the author seems to have fallen into this error here.

The book is printed on India paper, and is much more convenient to handle than any law book of its length that we have seen. It is in general free from misprints and small errors. One misstatement, however, is made, (Vol. I, p. 11) in crediting the well-known quotation on hearsay from the *Berkeley Peerage Case* to Lord Mansfield instead of to Chief Justice (Sir James) Mansfield, who wrote the opinion in the case.

The book is particularly full in its citation of California authorities, a fact which should make it useful to the bar of that State.

In regard to the book's style, the author in his preface says: "Here will be found no flights of forensic diction." In general this is true; still, (Vol. I, p. 13) we find the following: "Given then this original state of things, the apparent transition from the crude and aboriginal views of what might be offered before the tribunal, to the present elaborately indexed guide to what is and what is not evidence is in reality the evolution which growth and interchange of ideas of commerce, and of education, has fortunately and relentlessly demanded." Again referring to Prof. Thayer, who is rightly given by the author a very high place among the writers on evidence, it is said (p. 660): "Thayer, who seems of all the writers on evidence to have not only acquired a giant grasp of his subject, but to have combined it with a Byronic facility of diction, and clarity of expression." In a few passages like the foregoing, the wings of the author's diction seem to have gotten a little beyond control.

As a whole, the book is somewhat inferior to either Wigmore or Chamberlayne as a treatise on evidence. Nevertheless, it has merits of its own, the chief one being the industry which has brought together so much excellent material bearing on the subject.

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CHAPTERS ON THE LAW RELATING TO THE COLONIES. By SIR CHARLES JAMES TARRING, KNT., sometime Judge of H. B. M. Supreme Consular Court, Constantinople, and H. M.'s Consul, late Chief Justice of Grenada, West Indies. Fourth Edition. London: STEVENS & HAYNES. 1913. pp. xxii, 398.

Our early origin as British colonies and plantations would be sufficient excuse for an interest in a work on the law relating to the British colonies, and this interest has certainly been heightened by our own experience in colonization during the past sixteen years.

The principal divisions of the present work are as follows:

1: The laws to which the different classes of colonies are subject;

2: The executive;

3: The legislative power;

4: The judiciary and the Bar;

5: Appeals from the colonies;

6: Imperial statutes in force relating to the colonies.

Save for the first part, that is, the laws to which the colonies are subject the book would only be of interest either to Britishers or as